NG SOO LAY

v.

DEVELOPMENT & COMMERCIAL BANK BHD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
SITI NORMA YAAKOB JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: W-02-527-95]
14 MAY 1998

CONTRACT: *Guarantee - Overdraft facilities - Whether such facilities had been settled by the person guaranteed*

CONTRACT: *Guarantee - Overdraft facilities - Whether there was a variation in the contract granting such facilities - Whether such variation had discharged the guarantor*

This was an appeal against the decision of the court below dismissing the appellant's application to set aside the judgment in default which was taken against him by the respondent.

The claim was against the appellant as guarantor for a facility granted by the respondent to one Siong Export Industries Sdn Bhd ('Siong'). The High Court judge at the appeal stage found that the judgment in default was regularly obtained. The appellant raissed a number of issues which revolved around cls 2, 7 and 16 of the letter of guarantee executed by the appellant.

The appellant contended that: (i) the overdraft facility granted to Siong by the respondent was only for 7 months and had been settled by Siong ('the overdraft facility'); (ii) the trust receipt facility was used for another purpose ('the trust receipt facility'); and (iii) the respondent had made numerous unauthorised transfers of funds out of Siong's current account.

Held:
Per Abdul Malek Ahmad JCA:

[1] The terms of repayment for the overdraft facility were restructured. The appellant had only produced the monthly statements of account up to the end of May 1991 while the respondent had annexed all financial statements till the end of 1992 which were consistent with the claim made.

[2] Siong had never disputed the trust receipt facility and had used it all along with no objections.

[3] The transfer of funds from Siong's current account had never been objected to by the appellant earlier. There had never been any complaint of wrongful debit.

[4] After a careful analysis of cls 2, 7 and 16 of the letter of guarantee and the relevant accounts and correspondence, the court was of the unanimous view that there was no merit to the appellant's contentions.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini merupakan satu rayuan terhadap keputusan mahkamah di bawah yang menolak permohonan perayu untuk mengenepikan penghakiman ingkar yang telah diambil terhadap beliau oleh responden.

Tuntutannya adalah terhadap perayu sebagai penggerenti untuk kemudahan yang diberikan oleh responden kepada Siong Export Industries Sdn Bhd ('Siong'). Hakim Mahkamah Tinggi, pada tahap rayuan, telah memutuskan bahawa penghakiman pengikraran telah diperolehi dengan wajarnya. Perayu telah membangkitkan beberapa isu yang berkaitan dengan fasal-fasal 2, 7 dan 16 surat gerenti yang dilaksanakan oleh perayu.

Perayu telah berhujah bahawa: (i) kemudahan overderaf yang telah diberikan kepada Siong oleh responden adalah hanya bagi tempoh selama tujuh bulan dan telah dijelaskan oleh Siong ('kemudahan overderaf tersebut'); (ii) kemudahan resit amanah tersebut telah digunakan bagi satu tujuan yang lain ('kemudahan resit amanah'); dan (iii) responden telah membuat beberapa pemindahan dana yang tidak dibenarkan keluar dari akaun semasa Siong.

Diputuskan:
Oleh Abdul Malek Ahmad HMR:

[1] Syarat-syarat pembayaran balik bagi kemudahan overderaf tersebut telah disusun semula. Perayu telah hanya mengemukakan penyata-penyata akaun bulanan sehingga penghujung bulan Mei 1991 sedangkan responden telah melampirkan kesemua penyata-penyata kewangan sehingga penghujung tahun 1992 yang mana adalah konsisten dengan tuntutan yang dibuat.

[2] Siong tidak pernah mempertikaikan kemudahan resit amanah dan telah selama itu menggunakannya tanpa sebarang bantahan.

[3] Pemindahan dana daripada akaun simpanan semasa Siong tidak pernah dibantah pada awalnya oleh perayu. Tidak terdapat terdapat aduan mengenai pendebitan secara salah.

[4] Selepas dianalisa dengan teliti akan Fasal-Fasal 2,7 dan 16 surat gerenti tersebut dan akaun-akaun serta perutusan surat yang relevan, mahkamah sebulat suara berpendapat bahawa tidak terdapat sebarang merit pada penegasan perayu.

[Rayuan ditolak.]

Cases referred to:

Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Bhd [1994] 1 CLJ 328 ***(cit)***

For the appellant - Joseph Yeo (HY Lee with him); M/s AJ Ariffin, Yeo & Harpal
For the respondent - Low Kim Leng; M/s Soo Thien Ming & Shahrizat

[Appeal from High Court, Kuala Lumpur; Suit No: D2-22-782-93]

Reported by Ling Hea Hoon

JUDGMENT

Abdul Malek Ahmad JCA:

Judgment in default had been taken against the appellant on 8 July 1994 and the learned Senior Assistant Registrar on 14 April 1995 had dismissed the application to set aside the said judgment in default.

The claim against the appellant in the court below was as guarantor based on a guarantee for a facility granted by the respondent to Siong Export Industries Sdn. Bhd. (hereinafter "Siong). The High Court judge at the appeal stage found that the judgment in default was regularly obtained and consequently it was mandatory for the appellant to file an affidavit on the merits – see *Hasil Bumi Perumahan Sdn. Bhd. & 5 Ors. v. United Malayan Banking Bhd.* [1994] 1 CLJ 328.

In support of the relevant application, the appellant had raised a number of issues. One was that the overdraft facility was only for seven months and had been settled by Siong. However, on Siong's application, the terms of repayment were restructured. The appellant had only produced the monthly statements of account up to the end of May 1991 while the respondent had annexed all financial statements till the end of 1992 which were consistent with the claim made.

Another issue was that the trust receipt facility was used for another purpose. However, the learned High Court judge held that Siong never disputed the facility and had used it all along with no objections.

Before us, Encik Joseph Yeo for the appellant submitted that the appellant was only a guarantor and it was Siong which had defaulted in payment. The credit facility letter of offer dated 12 December 1989 for RM1.6 million stated a period of seven months from the date of drawdown. The joint and several letter of guarantee was dated 6 January 1990. The overdraft facility was reinstated on 8 July 1991 but subject to a limit of RM50,000 for a period of six months.

Learned counsel had specifically referred to three clauses in the letter of guarantee. Clause 2 reads as follows:

> 2. This guarantee shall not be considered as satisfied by any intermediate payment or satisfaction of the whole or any part of any sum owing as aforesaid but shall be a continuing security and shall extend to cover any sum or sums of money which shall for the time being constitute the balance due from the customer to the Bank upon any such account as hereinbefore mentioned.

Clause 7 states:

> 7. The Bank may at all times without prejudice to this guarantee and without discharging or in any way affecting our liability hereunder: and without notice to any of us:
>
> (1) determine vary or increase any credit to the customer;
>
> (2) grant to the customer or to any other person any time or indulgence;
>
> (3) renew any bills notes or other negotiable securities;
>
> (4) take any other securities or guarantees from the customer or any other person;
>
> (5) deal with exchange release modify or abstain from perfecting or enforcing any securities or other guarantees or rights which the Bank may now or hereafter have from or against the customer or any other person;
>
> (6) compound with the customer or with any other person or guarantor.

At p. 3 of the letter of guarantee, cl. 16 provides:

> 16. No one of us shall be discharged or released from this guarantee by any arrangement made after this guarantee or any dealing between the customer and the Bank without our knowledge or consent or by any variation or alteration without our knowledge or consent in the agreement between the customer and the Bank for the making of advances or otherwise giving credit or affording banking facilities to the customer by the Bank.

a In order to give full effect to the provisions of this guarantee each of us hereby waives all rights inconsistent with such provisions and which we might otherwise as sureties be entitled to claim and enforce and we declare that the Bank shall be at liberty to act as though we or each of us were principal debtors or principal debtor to the Bank for all payments guaranteed by us as aforesaid to the Bank.

b The appellant also referred to para. 17 of her affidavit where she had averred as follows:

17. I further state that from the statements of accounts in the records of the Borrower the Plaintiff had made numerous unauthorised transfers of funds c out of the Borrower's current account No. 20002-0074134 in excess of RM100 Million. In January, 1991 alone, the Plaintiff made the following unauthorised transfers:-

(a)	3 - 1 - 91	RM 920,002.00
d (b)	4 - 1 - 91	RM 223,708.00
(c)	4 - 1 - 91	RM 545,126.92
(d)	9 - 1 - 91	RM 549,038.33
(e)	17 - 1 - 91	RM1,232,204.58
e (f)	23 - 1 - 91	RM 226,301.79
(g)	24 - 1 - 91	RM 255,109.71
(h)	28 - 1 - 91	RM 509,456.61
f (i)	29 - 1 - 91	RM 271,565.78
(j)	30 - 1 - 91	RM2,944,477.44

		RM7,767,991.16
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g Learned counsel for the respondent pointed out that the transfer of funds had never been objected to by the appellant earlier referring to Siong's letters on various dates from pp. 187 to 200 in the appeal record. There had never been, he added, any complaint of wrongful debit.

h As for the restructuring of the credit facilities, learned counsel had referred to their letter dated 4 April 1990 where a monthly reduction of RM50,000 would commence in March 1990 and to be reviewed in June 1990. Another letter dated 25 August 1990 referred to a temporary overdraft of RM829,000 consequent to the respondent's refusal to grant to Siong the reinstatement of

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their credit limit to RM1,110,000. Then, of course, there is the letter dated 8 July 1991 reinstating the temporary overdraft facility pursuant to their letter of offer dated 12 December 1989 subject to a limit of RM50,000 only for a period of six months secured against the existing debenture and the joint and several guarantee of the directors including the appellant.

After a careful analysis of cls. 2, 7 and 16 of the letter of guarantee and the relevant accounts and correspondence, we were of the unanimous view that there was no merit to the appellant's contentions and, since the judgment in default was obtained regularly, we had no hesitation in dismissing the appeal with costs. We also ordered that the deposit is to go to the respondent to account of their taxed costs.